STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

XO Illinois, Inc. and Allegiance Telecom of Illinois, Inc.	:	
-vs-	:	**05-0156**
Illinois Bell Telephone Company	:	
Complaint pursuant to 220 ILCS 5/13-515.	:	

ORDER GRANTING EMERGENCY RELIEF

By the Commission (through its Administrative Law Judge):

I. Procedural History

On March 7, 2005, XO Illinois, Inc., and Allegiance Telecom of Illinois, Inc. ("Complainants" or "XO and Allegiance"), filed this verified Complaint against Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC"), alleging that SBC is in violation of Section 13-514 of the Illinois Public Utilities Act ("Illinois Act")[1], Article IX of the Illinois Act, 47 C.F.R. § 51.809(a), and Section 252 of the Federal Telecommunications Act of 1996 ("Federal Act")[2]. Section 13-514 of the Illinois Act states that a telecommunications carrier "shall not knowingly impede the development of competition in any telecommunications service market." Section 252 of the Federal Act establishes processes and standards by which incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") must create and amend interconnection agreements ("ICAs"). Complainants contend that SBC has affronted these laws by issuing Accessible Letters stating that, effective March 11, 2005, SBC will not accept new orders for certain unbundled network elements ("UNEs") and will increase certain UNE rates.

On March 8, 2005, Complainants filed a Motion for Emergency Relief ("Motion") in this docket, requesting that the Commission immediately bar SBC from refusing new orders for high capacity loops and transport and from unilaterally raising it prices for certain UNEs. Complainants request that such emergency relief continue until the parties are able amend their ICAs through negotiation or until the parties have completed the arbitration process outlined in Section 252 of the Federal Act and the amendments have become effective.

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[1] 220 ILCS 5/13-514.
[2] 47 USC 252.

On March 9, 2005, SBC filed a Response in Opposition ("Response") to Complainants' request for emergency relief. SBC urges the Commission to deny that request in all respects.

II. The Complaint

XO and Allegiance allege that SBC's stated intent to discontinue offering certain UNEs and to raise the prices for other UNEs are a violation of 47 USC 252, 47 C.F.R § 51.809(A), Article IX of the Illinois Act and 220 ILCS 5/13-514(1),(2), (4),(5), (6), (8), (11), and (12). Further, they allege that SBC has "knowingly" impeded competition as that term is used in 220 ILCS 5/13-514. The Complaint also alleges that SBC has unbundling obligations under Section 13-801 of the Illinois Act and under Section 271 of the Federal Act that must be considered when determining if SBC may stop offering a UNE.

In the context of ruling on the Motion, the principal claim in the Complaint is that the Federal Communications Commission ("FCC"), in the Triennial Review Remand Order ("TRRO")[3], held that any changes to an existing ICA for the purpose of implementing the TRRO must be accomplished through the negotiation, mediation and arbitration procedures contained in Section 252. If that claim is correct, it follows that unilateral implementation by SBC, in the manner set forth in the pertinent Accessible Letters, ignores Section 252 and contravenes the TRRO.

XO and Allegiance state that they have satisfied the notice requirement in subsection 13-515(c) of the Act by sending letters to SBC on March 2, 2005, requesting that SBC (1) cease its demand that XO and Allegiance agree to the accessible letters, (2) enter into good faith negotiations to amend the parties' interconnection agreements, and (3) agree to continue to provide unbundled network elements and agree to take orders for new unbundled network elements under the parties' existing interconnection agreement under existing prices until an amendment becomes effective. SBC apparently responded on March 4, 2005 and supplemented that response on March 7, 2005 agreeing to negotiate changes in the parties' interconnection agreements to reflect changes necessitated by the TRRO, but that SBC will still implement its plan to stop taking certain UNE orders effective March 11, 2005.

III. Emergency Relief Requested

XO and Allegiance specifically ask the Commission to grant the following emergency relief:

> 1) declare that the transition provisions of the TRRO are not self-effectuating but rather are effective only at such time as the Parties' existing interconnection agreements are superceded by amendments the

[3] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier*, WC Docket No. 04-313; CC Docket No. 01-338, (FCC released Feb. 4, 2005)("TRRO").

parties must negotiate and perhaps arbitrate pursuant to the rules and procedures established by this Commission for approval of interconnection agreements;

2) issue an order prohibiting SBC from no longer accepting new orders for high-cap loops and transport after March 11, 2005 and from charging rates other than those currently being charged; and

3) grant Complainants such other relief as the Commission deems just and reasonable.

IV. Applicable Statute

The law governing a request for emergency relief by a telecommunications provider is set forth in subsection 5/13-515(e) of the Act:

> If the alleged violation has a substantial adverse effect on the ability of the complainant to provide service to customers, the complainant may include in its complaint a request for an order for emergency relief. The Commission, acting through its designated hearing examiner or arbitrator, shall act upon such a request within 2 business days of the filing of the complaint. An order for emergency relief may be granted, without an evidentiary hearing, upon a verified factual showing that the party seeking relief will likely succeed on the merits, that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and that the order is in the public interest. An order for emergency relief shall include a finding that the requirements of this subsection have been fulfilled and shall specify the directives that must be fulfilled by the respondent and deadlines for meeting those directives. The decision of the hearing examiner or arbitrator to grant or deny emergency relief shall be considered an order of the Commission unless the Commission enters its own order within 2 calendar days of the decision of the hearing examiner or arbitrator. The order for emergency relief may require the responding party to act or refrain from acting so as to protect the provision of competitive service offerings to customers. Any action required by an emergency relief order must be technically feasible and economically reasonable and the respondent must be given a reasonable period of time to comply with the order. 220 ILCS 5/13-515(e).

V. XO and Allegiance's Position

According to XO and Allegiance, the foregoing statute establishes three conditions that must be met to obtain emergency relief: "[1] that the party seeking relief will likely succeed on the merits, [2] that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and [3] that the order is in the

public interest." 220 ILCS 5/13-515(e). Complainants contend that they satisfy those requirements here.

Complainants bring the instant matter before the Commission in light of SBC's "Accessible Letters" issued on February 11, 2005 stating that certain provisions of the FCC's TRRO are self-effectuating as of March 11, 2005. According to XO and Allegiance, SBC has misread the TRRO and that, as with any change in law, the TTRO is a change that must be incorporated into ICAs prior to being implemented. Complainants assert that the TRRO and the new final rules issued therewith should be incorporated into interconnection agreements via the Section 252 process, which requires negotiation by the Parties and arbitration by the Commission of issues which Parties are unable to resolve through negotiation.

The Complainants believe that the TRRO changes in law should be incorporated into their ICA through amendments, but that they must be negotiated pursuant to the federal act and the parties current ICAs, not unilaterally amended by SBC. They also contend that that any new amendments must recognize SBC's unbundling obligations pursuant to Section 13-801 of the Illinois Act and Section 271 of the Federal Act. Complainants assert that until the parties reach a negotiated resolution of an amendment, they must abide by their existing interconnection agreements as required by the parties' ICAs, the Federal Act and the TRRO.

Complainants assert that they will be irreparably harmed if they are not granted emergency relief. Even if this case proceeds on the schedule required under Section 13-515, XO and Allegiance assert that it will be months before they obtain an order directing SBC to provide the contested UNEs pending the completion of negotiations and perhaps an arbitration of new amendments to the parties' interconnection agreements. During that time, XO and Allegiance will be hindered in their attempts to compete for customers against SBC because they will be able to use the necessary unbundled elements to provide service to their customers.

According to Complainants, an entry of an order granting the requested emergency relief will not cause irreparable harm to SBC. XO and Allegiance assert that they are merely asking the Commission to maintain the status quo until the parties complete the negotiations contemplated by their interconnection agreements and this Commission approves any resulting agreement - or resolves any dispute through the arbitration process. Thus, they assert, any balance of hardships clearly favors XO and Allegiance.

Finally, Complainants contend that the public interest would be furthered if SBC is promptly forced to comply with the clear and unambiguous provisions of the Federal and Illinois Acts.

VI. SBC's Response

SBC asserts that the change of law provisions in the Complainants' ICAs provide that if an FCC order invalidates or modifies any regulation that was the basis for a provision in those ICAs, the affected provisions "will be *immediately* invalidated, modified or stayed *as required to effectuate the subject order*" (XO ICA) or "shall be *immediately* invalidated, modified or stayed, consistent with" (Allegiance ICA) the FCC order. (Emphases added.) Thus, according to SBC, the Complainants' lead argument, that the parties must continue to conduct business pursuant under the obsolete terms of their interconnection agreements until those agreements are amended, is wrong.

Also, SBC maintains that parts of the UNE regimen that the FCC established in the TRRO are, by the clear and unambiguous terms of the TRRO, to be given effect immediately, without awaiting interconnection agreement amendments, while other parts of that regimen are to be given effect through amendments to interconnection agreements. SBC argues that the TRRO does not permit CLECs to obtain, after March 11, new unbundled access to network elements as to which the TRRO found there is no impairment. For example, given the FCC's finding that there is no impairment with respect to mass market local switching, the FCC's establishment of a "nationwide bar" on unbundled access to local switching (TRRO ¶ 204), and the FCC's determination that that bar would go into effect on March 11, 2005, Complainants' position that the TRRO permits them to obtain unbundled access to local switching to serve new customers on, say, March 15 is absurd, according to SBC. SBC recognizes that the TRRO does require carriers to amend their interconnection agreements to reflect the TRRO plans for transitioning customers that currently lease network elements as to which the FCC found no impairment away from those network elements. But that transition plan requirement does not support Complainants' position here with respect to orders for new access to unbundled network elements.

In any event, SBC contends, there is no emergency, and no imminent risk of harm to Complainants (irreparable or otherwise) with respect to unbundled local switching or the UNE-P, because SBC informed the Complainants that SBC will, at least for now, continue to fill orders for unbundled local switching and UNE-P.

Complainants also have not shown, and cannot show, that there is any emergency, or any risk of harm to Complainants, with respect to high-capacity loops or transport. SBC will continue to fill orders for high-capacity loops and transport involving wire centers that are eligible for such orders under the TRRO, and SBC has published a list of those wire centers that are not eligible. Complainants do not allege, let alone demonstrate, that any of the wire centers that SBC has listed as ineligible are in fact eligible. Nor do Complainants allege, let alone demonstrate, that there is any reason to believe that either of them will – in the near future or otherwise – have any disagreement with SBC about which wire centers are eligible and which are not, or, for that matter, that either of them will seek to place an order for a high-capacity loop or transport that SBC will decline to fill. Thus, Complainants do not even have a live claim with respect to high-capacity loops or transport, much less an emergency.

According to SBC, the FCC ruled that incumbent LECs would be entitled to receive additional compensation (one dollar over the applicable UNE-P rate) for the "embedded base" of UNE-P lines – i.e., UNE-P lines in service as of the effective date of the order. Id. ¶ 228; see 47 C.F.R. § 51.319(d)(2)(iii). "UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes." TRRO ¶ 228 n.630.

SBC also asserts that Complainants' reliance on Section 271 of the Federal Act and Section 801 of the Illinois Act is misplaced.

Complainants, SBC contends, will not suffer irreparable harm because SBC is not going to reject orders for unbundled local switching or UNE-P in the near future, and Complainants have neither alleged nor proven any basis for an expectation that they are going to submit any orders for high capacity loops or transport that SBC will improperly reject. Further, SBC asserts that Complainants do not explain why they cannot serve customers with comparable services offered by SBC at non-TELRIC prices and then, if XO and Allegiance ultimately carry the day on the legal issues, recover the monetary difference from SBC.

VI. Commission Analysis and Conclusion

A. The basis for emergency relief

Initially, the Commission concludes that discontinuing the offering of certain UNEs meets the threshold requirement in subsection 13-515(e) that the conduct alleged in a complaint must have "a substantial adverse effect on the ability of the complainant to provide service to customers." As Complainants argue, the sudden inability to offer certain products to end-users may result in the loss of customers and difficulty in competing for new customers.

Subsection 13-515(e) establishes three conditions for emergency relief: "[1] that the party seeking relief will likely succeed on the merits, [2] that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and [3] that the order is in the public interest." The Commission has addressed these conditions in previous proceedings. Order Granting Emergency Relief, Docket 02-0443, July 8, 2002, ("Ameritech Emergency Relief Order"); Order Granting Emergency Relief, Docket 02-0160, Feb. 27, 2002, ("Z-Tel Emergency Relief Order").

With respect to the likelihood that XO and Allegiance will prevail on the merits, the Commission reiterates the legal standard adopted in the Z-Tel Emergency Relief Order[4] – that the complaining party must demonstrate a "fair question" that it will likely

[4] Order Granting Emergency Relief, Docket 02-0160, Feb. 27, 2002, at 5-7, ("Z-Tel Emergency Relief Order")

prevail on its substantive claims, and that the status quo should be maintained until a full hearing on the merits takes place. C.D. Peters Co. v. Tri-City Regional Port District, 281 Ill. App. 3d 41, 47, 216 Ill. Dec. 876, 880, 666 N.E. 2d 44, 48 (5th Dist. 1996). This is a two-part test, involving *both* the fair question of successful litigation and the appropriateness of maintaining the status quo.

In the TRRO, the FCC plainly stated that "carriers must implement changes to their [ICAs] consistent with our conclusions in this Order." TRRO, ¶233. Thus, there is no question that the parties here will have to revise their ICAs to reflect the FCC's current view of availability and pricing for the UNEs addressed in the TRRO. Accordingly, SBC's intention to transact business with Complainants in a manner that differs from certain substantive provisions of the parties' existing ICAs is supported by the TRRO. For purposes of emergency relief, however, the question is whether SBC can ignore certain terms of its ICAs *now*, without first altering the terms of those ICAs through bilateral negotiations and, if needed, dispute resolution proceedings, with each Complainant. In other words, the dispositive issue is not whether the parties' ICAs and business dealings must change, but *how* such change must occur and *when* the parties can begin operating under revised terms.

As for the specific UNEs mentioned in the Motion, high capacity loops and transport, the TRRO includes, in paragraph 234, a process for determining which wire centers are eligible. As the FCC made clear, however, a different process may be negotiatied pursuant to Section 252(1)(1). (See Footnote 660). To the extent that SBC, through its Accessible letters is attempting to immediately alter the relationship between the parties, that appears to be contrary to the FCC's intent.

After reviewing the Complaint, the Motion, SBC's Response and their respective attachments, we conclude that, at the least, XO and Allegiance have raised a "fair question" that they will succeed on the merits. Section 13-514 states that a telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. XO and Allegiance have raised a fair question that SBC has violated this Section 13-514 general prohibition and also in particular, but not limited to, the per se impediments included in Sections 13-514 (6), (8), and (10). Specifically, Section 13-514(8) states that it is a per se impediment to the development of competition for a carrier to violate:

> the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 in a manner that unreasonably delays, increases the cost, or impeded the availability of telecommunications services to consumers (220 ILCS 5/13-514(8)).

Unilaterally refusing to provide certain UNEs that are currently offered under the terms of the parties' current ICAs and unilaterally increasing the prices for UNEs charged under the terms of the current ICAs raises a fair question that SBC has violated Section 13-514(8). In the TRRO, the FCC did not intend to disrupt the negotiation and

arbitration processes outlined in Section 252. Thus, Complainants have raised a fair question that they will likely prevail on their substantive claims regarding the need to follow the Section 252 processes for implementing the TRRO, in order to comply with Section 13-514.

To be clear, the final decision reached by the Commission may not reach this conclusion and then again it may also find SBC to be in violation of Section 271 and Section 13-801 as addressed by the Complainants. For purposes of emergency relief, however, the Complainants have sufficiently shown that they have a likelihood of success on the merits of part of their Complaint. We simply hold now that Complainants have presented a fair question of whether the use of the unilateral Accessible Letters, instead of Section 252 processes, to modify the terms under which the parties will presently transact business, is authorized by the TRRO. Indeed, our preliminary conclusion is that the TRRO does not permit such self-help. Moreover, the Accessible Letters do not address, or may wrongly decide, how some of the details of TRRO implementation will be accomplished. For the time being, we believe that the FCC intended for those details to be addressed through bilateral negotiations and, if needed, dispute resolution.

The next consideration is whether to preserve the status quo pending the outcome of this litigation. The status quo in this case has two elements – the continued offering by SBC of the same UNEs it currently offers and at the same prices it currently charges.

Subsection 13-515(e) of the Act specifically governs the emergency relief at issue here. That provision expressly states that "[t]he order for emergency relief may require the responding party *to act or refrain from acting* so as to protect the provision of competitive service offerings to customers." 220 ILCS 5/13-515(e) (emphasis added).

It is appropriate to maintain the status quo to the extent that XO and Allegiance have established the likelihood of irreparable harm in their ability to serve customers if emergency relief is not granted. In the Illinois courts, alleged harm is irreparable when "the injured party cannot be adequately compensated therefor in damages or when damages cannot be measured by any certain pecuniary standard." Cross Wood Products, 97 Ill. App. 3d 282, 286, 422 N.E.2d 953, 957 (1981). Irreparable harm also includes "prolonged interruptions in the continuity of business relationships," Prentice Medical Corp. v. Todd, 145 Ill. App. 3d 692, 700, 495 N.E.2d 1044, 1050 (1986), "transgressions of a continuing nature…resulting in damage to the good will of a business which would be incalculable," *id*., 145 Ill.App.3d at 701, 495 N.E. 2d at 1051, and "loss of competitive position." *Id*. Alternatively, irreparable harm encompasses "that species of injury that ought not to be submitted to on the one hand or inflicted on the other." *Id*.

XO and Allegiance's request that the status quo be maintained in that the same UNEs be continued to be offered as required by their ICAs meets this requirement. SBC claims that there is no possible harm to Complainants for high capacity loops and

dedicated transport facilities because it does not intend to improperly reject any such orders. This argument, however, assumes that what is a proper order is undisputed, which is not at all clear. As outlined in their Motion, XO and Allegiance could potentially lose current customers and also not be able to compete for new customers if SBC is allowed to unilaterally restrict the availability of certain UNEs.

SBC has indicated that it intends to continue to offer new UNE-P for the near future, so it should not make a material difference to include this requirement in the emergency relief. Regardless, we believe that the Complainants have shown potential irreparable harm if this element were unilaterally removed by SBC.

It is not clear, however, that the Complainants' ability to serve customers will be irreparably harmed if SBC unilaterally raises the prices for certain UNEs. Whether such increases are allowed by the TRRO, the parties' ICAs or any provision of law is not addressed here, but rather will be addressed in the Commission's final order in this docket. The only question here is if XO and Allegiance will be irreparably harmed if the prices are raised as outlined in the Accessible Letters. The answer is no. Those increases are precisely quantified now and will remain so at the end of this case. Consequently, if Complainants prevail on their underlying Complaint, compensation can be precisely quantified. Thus, while Complainants would suffer harm if SBC incorrectly applies a price increase to a given UNE, that harm would not be irreparable.

What we can say with certainty at this juncture is that allowing SBC to discontinue offering certain UNEs after March 11, 2005 will interrupt the commercial relationships between XO and Allegiance and their customers. In particular, the loss of the ability to offer their end-customers certain products based on SBC's withdrawal of UNEs might never be corrected and could damage XO and Allegiance's competitive position. These circumstances constitute irreparable harm.

Next, XO and Allegiance have demonstrated that immediate relief is in the public interest. The end-user customers of XO and Allegiance will be greatly inconvenienced by such a sudden, drastic change in the availability of certain UNEs from their chosen carrier. In addition, all telecommunications customers could be adversely affected by damage to the fair and effective competition promoted by the Illinois Act.

Thus, XO and Allegiance have shown that they will likely succeed on the merits of their Complaint. XO and Allegiance have also shown that if SBC is allowed to unilaterally discontinue offering the UNEs included in their current ICAs their ability to serve customers will be irreparably harmed. Finally, XO and Allegiance have shown that requiring SBC to continue to offer the UNEs as contained in their current ICAs is in the public interest and, therefore, emergency relief is appropriate.

B. The contents of emergency relief

The actions required by an emergency relief order under subsection 13-515(e) "must be technically feasible and economically reasonable and the respondent must be

given a reasonable period to time to comply with the order." 220 ILCS 5/13-515(e). The emergency relief requested by XO and Allegiance are, in summary: 1) declare that the TRRO is not self-effectuating; 2) continue to offer the same UNEs and 3) at the same prices.

It is not appropriate at this time to make a declaration that the TRRO is not self-effectuating, rather this is more appropriately decided in the final order that will be issued by the Commission in this docket. Maintaining the status quo by requiring SBC to continue to offer the same UNEs that are currently being offered pursuant to the parties' ICAs is unquestionably technically feasible. Requiring SBC to continue to offer these UNEs is also economically reasonable and SBC does not argue that it would not be so. This order merely maintains the status quo, it does not requires SBC to take any affirmative action. Indeed, the Commission's final order can address any economic harm to SBC if the Complainants do not succeed on the merits. As determined above, the Complainants will not suffer irreparable harm if the prices are raised and therefore this relief will not be granted.

This emergency order is effective until the parties have an amended their ICAs pursuant to the process contained in Section 252 of the Federal Act or as directed by the Commission in the final order that results from the Complaint in this proceeding.

VII. Findings and Ordering Paragraphs

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) XO and Allegiance are telecommunications carriers within the meaning of Section 13-202 the Act and are authorized to provide local exchange service within the State of Illinois;

(2) SBC is a telecommunications carrier within the meaning of Section 13-202 of the Act and is authorized to provide local exchange service within the State of Illinois;

(3) the Commission has jurisdiction over the parties and the subject matter of this Complaint;

(4) XO and Allegiance have shown that the conduct alleged in the Complaint has a substantial adverse effect on it ability to provide service to customers;

(5) XO and Allegiance have also shown that they will likely succeed on the merits, that will suffer irreparable harm in their ability to serve customers if emergency relief is not granted, and that certain emergency relief described in the prefatory portion of this Order is in the public interest;

(6) XO and Allegiance have shown that certain emergency relief described in the prefatory portion of this Order is technically feasible and economically reasonable;

(7) XO and Allegiance should be granted the following relief:

SBC should be ordered to continue to offer the same UNEs as required by the parties' current ICAs until those ICAs are amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding.

IT IS THEREFORE ORDERED that XO and Allegiance's Motion for Emergency Relief is granted in part and denied in part.

IT IS FURTHER ORDERED that SBC is ordered to continue to offer the same UNEs as required by the parties' current ICAs until those ICAs are amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding.

IT IS FURTHER ORDERED that the relief ordered herein is interim in nature and that the Commission shall conduct a hearing on the remaining allegations of the Complaint.

IT IS FURTHER ORDERED that this decision is not a final order and is not subject to the Administrative Review Law.

By decision of the Administrative Law Judge this 9th day of March, 2005.

David Gilbert,
Administrative Law Judge